Supreme Court, U.S.
FILED
SEP 20 1999
OFFICE OF THE CLERK

No. 99-223

IN THE
Supreme Court of the United States

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Cross-Petitioner,

v.

W.R. GRACE & CO.-CONN. and
CHRYSLER MOTORS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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September —, 1999

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a state court's erroneous refusal to apply retroactively a decision of this Court bars the retroactive application of that decision to other litigants in subsequent cases. Applied specifically to this case, the question presented is whether the Washington Supreme Court's erroneous refusal to apply *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987) retroactively relieves the state from its obligation under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) to provide Grace and Chrysler with meaningful backward-looking relief and a clear and certain remedy from the tax declared unconstitutional in *Tyler Pipe*.

LIST OF PARTIES

The following parties, Appellants and Plaintiffs below, are Respondents in this matter, and are listed here with their respective parents and nonwholly owned subsidiaries:

Chrysler Motors Corporation (n/k/a DaimlerChrysler Corporation)

Parents: DaimlerChrysler AG

Nonwholly owned subsidiaries:

DaimlerChrysler Mexico Holding, S.A. de C.V.
Chrysler Financial Company, L.L.C.
Highland Park Development Corporation
Chase Securities Japan Limited
New Venture Gear, Inc.
Tritec Motors Ltda.
Cross Road Chrysler Plymouth, Inc., Okla. City, OK
East Tulsa Dodge, Inc., Tulsa OK
Kingswood CP, Inc., Cincinnati, OH
Kirkland CPJE, Inc., Kirkland, WA
La Brea Avenue Motors, Inc., Los Angeles, CA
Lexington Park Motors, Lexington Park, MD
Midfield Dodge, Inc., Midfield, AL
Northwest Dodge, Inc., Houston, TX
Performance Dodge, Inc., Woodbury, NJ
Ross Park Dodge, Inc., Pittsburgh, PA
Stoneridge Motors, Pleasanton, CA
Upper Darby CP, Inc., Upper Darby, PA
Webster Chrysler Jeep, Inc., Webster, NY

W.R. Grace & Co.-Conn.

Parent: W.R. Grace & Co.

Nonwholly owned subsidiaries:

GN Holdings, Inc.
LB Realty, Inc.

W.R. Grace Argentina S.A.
Grace N.V.
Grace Brasil Ltda.
Grace Quimica Compania Limitada
Grace Colombia S.A.
W. R. G. Colombia S.A.
W. R. Grace SAS
Grace Hellas E.P.E.
W. R. Grace (Hong Kong) Limited
W. R. Grace Southeast Asia Holdings Limited
W. R. Grace & Co. (India) Private Limited
Trans-Meridian Insurance (Dublin) Ltd.
W. R. Grace Italiana S.P.A.
Grace Container, S.A. de C.V.
W. R. Grace Holdings, S.A. de C.V.
Amicon B.V.
W. R. Grace (Philippines), Inc.
W. R. Grace Taiwan, Inc.
W. R. Grace (Thailand) Limited
Chasmbridge Limited

The following party was the Appellee and Defendant below, and is the Cross-Petitioner in this matter:

State of Washington, Department of Revenue

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondents, W.R. Grace & Co.-Conn. ("Grace") and Chrysler Motors Corporation ("Chrysler"), respectfully request the Court to deny the State of Washington, Department of Revenue's ("Department") Conditional Cross-Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Washington in *W.R. Grace & Co.-Conn. v. State Department of Revenue*, 973 P.2d 1011 (Wash. 1999).

REASONS TO DENY THE WRIT[1]

I. THE SUPREME COURT OF WASHINGTON PROPERLY CORRECTED ITS EARLIER ERROR BY HOLDING THAT *TYLER PIPE INDUSTRIES, INC. v. WASHINGTON DEPARTMENT OF REVENUE*, 483 U.S. 232 (1987) MUST BE APPLIED RETROACTIVELY.

In *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), this Court struck down a Washington business and occupation ("B&O") tax exemption on Commerce Clause grounds and remanded the case to the Washington Supreme Court for consideration of the taxpayers' refund claims. 483 U.S. at 252-53. On remand, the Washington Supreme Court held that *Tyler Pipe* applied only prospectively, and denied the taxayers' refund claims. *National Can Corp. v. Department of Rev.*, 749 P.2d 1286 (Wash.), *cert. denied*, 486 U.S. 1040 (1988). Subsequently, in *Digital Equipment Corp. v. Department of Revenue*, 916 P.2d 933 (Wash. 1996), *cert. denied*, 520 U.S. 1273 (1997), the Washington Supreme Court reversed its decision in *National Can* and held that this Court's decision in *Tyler Pipe* must be applied retroactively to claims predating *Tyler Pipe*.[2] The taxpayer sought this Court's review of

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[1] The Department mentions in passing that it challenges the Court's jurisdiction, but preserves the substance of those arguments for presentation in Case No. 99-31. Grace and Chrysler will likewise respond to the jurisdictional arguments in their reply in 99-31.

[2] In *National Can*, the Washington Supreme Court stated that, but for the nonretroactivity of *Tyler Pipe*, state law would have entitled the taxpayers to refunds of the discriminatory B&O tax. *National Can*, 749 P.2d at 1287. Yet, after holding in *Digital Equipment* that *Tyler Pipe* does apply retroactively, the Washington court has ruled that Grace, Chrysler, and similarly situated taxpayers are not entitled to refunds, but rather are relegated to

Digital Equipment, and the Department raised before this Court the issue of whether *Tyler Pipe* applied retroactively. [*See* Conditional Cross-Petition (No. 99-223), p. 13, n.2.]

There can be no genuine doubt that *Tyler Pipe* must apply retroactively, and that Grace, Chrysler, and similarly situated taxpayers are entitled to relief. The Court has rejected "selective prospectivity" under which litigants in a case announcing a new rule of law were granted relief under the new rule, but the old rule was applied to all other litigants with claims predating that decision. In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), this Court considered whether its ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), should apply retroactively to claims arising on facts predating that decision. 501 U.S. at 532. The Court held that *Bacchus* applied retroactively for two reasons: first, because the Court did not reserve the question of whether its decision applied to the parties; and, second, because the Court remanded *Bacchus* for the lower court's consideration of the remedial issues, which necessarily implied that the Court intended its decision to apply to those parties. 501 U.S. at 539. The Court in *Beam* went on to hold that when the Court has applied a rule of law to the litigants in one case, it must apply the same rule to all others not barred by procedural requirements or res judicata. *Id.* at 540. The Court subsequently reaffirmed the principle of *Beam* in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993):

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the meaningless remedy of an illusory credit. *Grace*, 973 P. 2d at 1021-22. The Washington court allowed the Department to impose retroactive deficiencies of the unconstitutional tax against Grace and Chrysler. The Department's arguments before this Court are merely attempts at a second bite of the *Digital Equipment* apple in an effort to deny these taxpayers relief.

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97.

As in *Beam*, the Court in *Tyler Pipe* applied its decision to the parties in that case, and *Tyler Pipe* likewise must apply to the claims of Grace and Chrysler arising from facts predating *Tyler Pipe*. *Tyler Pipe* applies retroactively under *Beam* and *Harper* because the Court in *Tyler Pipe* did not reserve the question of whether its decision applied to those parties, and because the Court remanded *Tyler Pipe* to the Washington Supreme Court solely for consideration of remedial issues:

> Our partial invalidation of the State's taxing scheme raises remedial issues that are better addressed by the State Supreme Court on remand. Accordingly, we vacate the judgment of the Supreme Court of Washington and remand for further proceedings not inconsistent with this opinion.

Tyler Pipe, 483 U.S. at 253. Thus, the Court remanded *Tyler Pipe* to the Washington Supreme Court only on the remedial issues presented by the taxpayers' refunds claims, and did not specifically reserve the choice of law issues. Because the Court applied *Tyler Pipe* to the parties then before the Court, whose claims arose from facts predating the decision, *Tyler Pipe* must also apply to the claims of Grace and Chrysler. *Beam*, 501 U.S. at 540; *Harper*, 509 U.S. at 98-99.

II. THIS CASE DOES NOT INVOLVE IMPERMISSIBLE "SELECTIVE PROSPECTIVITY"; RATHER, A CORRECTION OF THE WASHINGTON SUPREME COURT'S ERROR IN DENYING FULL RETROACTIVITY TO *TYLER PIPE*.

In its cross-petition, the Department seeks to turn the principle of *Beam* and *Harper* on its head, arguing that only the parties to *Tyler Pipe* were entitled to relief in accordance with that decision. The Department asserts that because the Washington Supreme Court once erroneously held that *Tyler Pipe* was not retroactive, and some litigants were denied relief on that basis, the prohibition against "selective prospectivity" must now apply to deny all other taxpayers the relief to which they would otherwise be entitled.[3] The question, however, is not whether all taxpayers must be denied relief because some taxpayers' claims may be barred; rather, the question is whether taxpayers not barred are entitled to the same relief that was (or should have been) extended to the parties in *Tyler Pipe*. The Court has answered the latter question in the affirmative in *Beam* and *Harper*.

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[3] What the Department really seeks is purely prospective application of *Tyler Pipe* (i.e., denying the benefit of *Tyler Pipe* to all litigants whose claims predate the date of that decision). The continued viability of pure prospectivity is questionable. *Beam*, 501 U.S. at 541, 544 ("Assuming that pure prospectivity may be had at all" and "We do not speculate as to the bounds or propriety of pure prospectivity"). In any event, if this Court had intended *Tyler Pipe* to be purely prospective, it would have said so; but it did not. Full retroactivity "is overwhelmingly the norm." *Beam*, 501 U.S. at 535. A departure from the rule of full retroactivity is appropriate only under narrowly prescribed circumstances, requiring a predicate announcement of a "new principle of law." *Chevron Oil Co. v. Huson*, 494 U.S. 97, 106 (1971). That circumstance is not presented here, because the Court relied upon clear past precedent in striking down the Washington B&O tax on Commerce Clause grounds. *Tyler Pipe*, 483 U.S. at 234-48 (relying on *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) and other precedents).

"Selective prospectivity" occurs where a new rule is applied to the parties in the case in which it is pronounced, while the old rule is applied to all other litigants with claims arising on facts predating the pronouncement. *Beam*, 501 U.S. at 537. The Court rejected selective prospectivity on grounds of stare decisis and the rule of law generally, adhering to the fundamental principle that litigants in similar situations should be treated the same. *Id.; Harper*, 509 U.S. at 98-99. The Court observed that, "[w]e depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Beam*, 501 U.S. at 537-38.

In this case the Department complains of unequal treatment, but any unequal treatment arises because of the Washington Supreme Court's initial erroneous refusal to apply *Tyler Pipe* retroactively in *National Can*, followed by its correction of that error in *Digital Equipment*. This case is the opposite of selective prospectivity. The policies underlying the Court's rejection of selective prospectivity—stare decisis and the rule of law—support the claims of Grace and Chrysler in this case. Therefore, this Court's rationale and holdings in *Beam* and *Harper* decrying selective prospectivity do not support the Department's cross-petition.

Moreover, *Beam* and *Harper* do not stand for the Department's underlying premise—that pure and absolute equality of treatment among litigants must prevail over a court's right and obligation to correct error, and over subsequent litigants' constitutional right to relief:

> [T]he principle of treating like cases alike cannot be applied blindly, without considering the correctness of the initial decision to be extended to all. That would be to raise *stare decisis* to an absolute com-

> mand, blocking the reconsideration and overruling of obsolescent or misguided holdings.

Rakowski, *Harper and Its Aftermath*, 1 Fla. Tax Rev. 445, 458 (1993).

The Washington Supreme Court correctly reconsidered its decision in *National Can* and determined that *Tyler Pipe* should have been applied retroactively. The parties in this case should not be subjected to assessments of retroactive deficiencies of an unconstitutional tax, should not be deprived of refunds of unconstitutional taxes they paid, and should not have their constitutional right to "meaningful backward-looking relief" under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), subsumed by the notion that this Court's choice of law doctrine demands absolute equality of treatment among litigants. It cannot be the law that two wrongs make a right.

CONCLUSION

The Washington Supreme Court correctly relied on precedent of this Court and on its own precedent in confirming that *Tyler Pipe* applies retroactively in this case. For these reasons, Respondents respectfully urge that Petitioner's conditional cross-petition be denied.

Respectfully submitted,

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